IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1575 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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VRAJLAL RATILAL

Versus

SHAH BALUBEN TALAKSHI SINCE DECEASED THROUGH HER HEIR

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Appearance:

1. Civil Revision Application No. 1575 of 1986

MR PM THAKKAR for Petitioner No. 1

MR SH SANJANWALA for Respondent No. 1

MR RS SANJANWALA for Respondent No. 1-1/1-1/1

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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 07/08/2002

ORAL JUDGEMENT

This is a revision application under Section 29(2) of the Bombay Rents, Hotels and Lodging House Rates (Controls) Act, 1947 challenging the judgments and decrees of the two courts below, under which the present petitioner-original tenant-defendant has been directed to be evicted from the tenanted property on the ground of non-payment of arrears of rent. The respondent herein

preferred a suit being Regular Civil Suit No.177/76 before the civil court at Chotila, Surendranagar District for evicting the petitioner from the tenanted property on the ground of non payment of arrears of rent. After hearing the parties and considering the evidence on record, the learned trial Judge decreed the suit in favour of the respondent and against the petitioner.

2. Feeling aggrieved by the said judgment and decree of the trial court, the petitioner herein preferred Regular Civil Appeal No.132/82 before the District Court at Surendranagar unsuccessfully. The learned Assistant Judge dismissed the said appeal by judgment and decree dated 30.9.1986. Hence this revision application.

3. Learned Advocate for the petitioner-original defendant-tenant has contended before this court that the two courts below have committed serious illegality in granting the decree for eviction of the petitioner on the ground of non payment of arrears of rent. It is also contended that the rent was payable according to Samvat Year calendar and that was an illegal contract in view of the provisions made under the Bombay Rent Act. That the demand made by the respondent in the notice under section 12(2) of the Act was also illegal inasmuch as the demand was made according to that calendar and not according to British calendar. That therefore, the two courts below ought to have dismissed the said suit of the respondent. It is, therefore, contended here that the judgments and decrees of the two courts below are illegal, perverse and deserve to be set aside. The petitioner has, therefore, prayed that the present revision application be allowed and the judgements and decrees of the two courts below may be set aside and the suit of the respondent before the trial court may be ordered to be dismissed with costs all throughout.

4. On receipt of the revision application, rule was issued. Mr S H Sanjanwala, learned Advocate appears in response to the service of notice of rule on the respondent. I have heard the learned Advocates for the parties and perused the papers. It is stated at the outset that the two courts below have recorded concurrent findings of fact that the petitioner was a tenant in arrears of rent for exceeding six months on the date of notice under section 12(2) of the said Act and that the petitioner neglected to make payment of rent then due within one month from the date of receipt of demand notice and, therefore, the suit squarely fell within four corners of the provisions of section 12(3) (a) of the said Act and, therefore, the decree for eviction of the

petitioner from the tenanted property was a must. In the present revision application, it seems that the matter was decided by this Court by judgment dated 13.10.2000 (Coram : Y B Bhatt, J.) dismissing the said revision application of the petitioner. However, the petitioner went to the Hon'ble Supreme Court and there a contention was raised that the notice was illegal inasmuch as the rent claimed in the demand notice was according to the Samvat Year calendar and not according to British calendar. The matter was, therefore, remanded to this Court and, therefore, it would be necessary for this Court to decide as to whether the demand notice can be treated to be legal or not. Learned Advocate for the petitioner arguing the matter has contended that admittedly, the demand notice clearly shows that the demand has been made according to Samvat Year calendar and not according to British calendar. It is also his contention that the provision has been made in section 27 of the said Act as under:

> "27 (1) Notwithstanding anything contained in any law for the time being in force or any contract, custom, or local usage to the contrary, rent payable by the month or year or portion of a year shall be recovered according to the British Calendar;
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> (2) The state Government may prescribe the manner in which rent recoverable according to any other calendar before the coming into operation of this Act shall be calculated and charged in terms of the British Calendar."

According to his arguments, it is obligatory on the part of the landlord to claim rent as per the British Calendar and demand for rent as per any other calendar would be illegal. It is true that section 27 has over-riding effect. Despite the fact that there may be contract or custom or legal usage to the contrary rent is payable in accordance with the British calendar. There cannot be any doubt about it. However, the point as to whether simply because the rent has been calculated on the basis of Samvat Year calendar in demand notice issued under section 12(2) of the said Act, the notice can be treated to be illegal. On this aspect of the case, there is a decision of this court in the case of Jetjamamd Dulhanumal v. Pratapray, reported in 16 GLR 496, wherein it has been clearly laid down that simply because notice demands rent according to Samvat Year Calendar, it cannot be treated to be illegal notice. Once the said point has been concluded by this court by a larger Bench, it would

not be open to the petitioner now to say that because simply the rent has been calculated according to Samvat Year Calendar, the notice is to be treated to be illegal. It has then been contended that the rent was payable by the tenant and the tenant was also required to pay taxes. Therefore, the rent cannot be treated to be payable by the month. It is very clear that the case would fall under section 12(3)(a) of the said Act only if following five ingredients are satisfied:

(i) The rent is payable by the month;
(ii) The tenant is in arrears of rent for six months or more.
(iii) The tenant is duly served with a demand notice under section 12(2) of the Act.
(iv) There is no dispute about standard rent within one month from the date of receipt of the demand notice;
(v) The tenant has neglected to pay rent then due within one month from the date of the receipt of demand notice under section 12(2) of the act.

There is no dispute that these five ingredients are required to be satisfied to attract the provision of section 12(3)(a) of the Act. However, it has been contended that the rent cannot be said to be payable by month as the tenant was required to pay tax also. In the present case, simply because tax is payable by tenant, it does not mean that rent is not payable by month. In fact, the landlord has not claimed tax in the demand notice and this was not disputed before the two courts below. On the contrary, both the courts have concluded that rent was payable by month and the case squarely falls within four corners of section 12(3)(a). In that view of the matter, this argument will not help the present petitioner.

5. It has also been contended that the standard rent was fixed at a later stage and, therefore, the petitioner could not deposit rent at an earlier stage. For the said purpose, learned advocate for the petitioner has relied upon a decision in the case of Rupaben v. Babubhai Deojibhai, reported in 1983(1) GLR 263. There it has been laid down that in order to avail himself of the benefit of section 12(3)(b) of the Rent Act, the tenant must know at what rate he has to go on paying the rent and if there was no such order of the trial court as well as the appellate court regarding the question of deciding what the standard rent is, the tenant can be said to be technically not able to deposit the rent in full, even though he may be willing to do so.

6. In the present case, we find that the tenant does not appear to have filed any application for fixation of even interim standard rent. The fact remains that the petitioner never paid any amount of rent before the issues were framed. This makes it clear that the arrears of rent were not deposited before the courts below at the first hearing i.e. on or before the date on which the issues were framed. In that view of the matter, protection of section 12(3)(b) of the said Act was not available to the petitioner and, therefore, the two courts below cannot be said to have committed illegality in passing a decree against the petitioner. Same way, in the case of Somabhai Kalidas Patel v. Bachubhai Sankalchand Modi, reported in 1986 GLR (U.J.) 22 also it has been stated that even if the rent in arrears is paid before the judgment in the appeal, the requirement of section 12(3)(b) can be said to have been complied with. Here also, the facts are not different. The two courts below have recorded concurrent findings of fact that the tenant was in arrears of rent and the case falls within four corners of section 12(3)(a) of the said Act and, therefore, the question of extending protection of section 12(3)(b) of the said Act will not come into play. It has to be said here that when the case is governed by section 12(3)(a), the question of extending protection of section 12(3)(b) does not arise at all.

7. In the case of Vishwambhar Hemandas v. Narendra Jethalal Gajjar, reported in 1985 GLH 1203, it has been laid down that if the rent payable is inclusive of taxes, then it cannot be said that the rent is payable by month. In the present case, the rent payable was not inclusive of tax and the tax was never claimed. Therefore, the said decision will also not come to the rescue of the petitioner.

8. It has, then been contended that the earlier suit filed by the respondent was withdrawn on condition to file a fresh suit on the same cause of action under Order 23 Rule 1 of the CPC. It has been contended that the second suit which was the suit before the trial court was filed on a different cause of action and, therefore, the second suit would not be maintainable. In support of the said contention, a decision in the case of Vallabh Das v. Dr. Madanlal & Ors., reported in 1970 SC 987 was referred to. The said decision is on an entirely different point based on as to whether the two suits were for the same subject matter or not. The said decision never said that a plaintiff who obtains permission under Order 23 Rule 1 of the CPC to withdraw a civil suit with

a permission to file a fresh one on the same cause of action is forbidden or prohibited from filing a second suit on a different cause of action. The second suit on the same cause of action is impermissible if the first one is withdrawn unconditionally. If a suit has been withdrawn with condition to file a fresh one on the same cause of action under Order 23 of the Code, then the plaintaiff is never bound to file a second suit on the same cause of action. Even otherwise, the learned Advocate for the petitioner makes it clear that this point was never agitated at any point of time. Any way the judgments and decrees of the two courts below cannot be said to be illegal on this count.

9. It is, therefore, clear that on the date of demand notice under section 12(2) of the said Act, the petitioner was a tenant in arrears of rent for exceeding six months and despite notice under section 12(2) of the Act, the petitioner did not pay up the rent the due within one month from the date of receipt of demand notice. He did not raise any dispute regarding standard rent within one month. Therefore, the case would squarely fall within four corners of Section 12(3)(a) of the act. Therefore, the court below did not have any option but to pass a decree for possession. The trial court as well as the District Court had done the same thing and, therefore, the judgments and decrees of the said two courts cannot be treated to be illegal and perverse. In that view of the matter, it is not open to this court to take a view different from the view recorded by the courts below on factual aspects and the findings of fact recorded by the two courts below concurrently, cannot be assailed in the revision application. The Court exercising revisional jurisdiction cannot lightly brush aside the said finding of fact recorded by the two courts below. If once those findings are accepted, there is no room for altering the finding of fact and there is no scope for of taking a view different from the view taken by the two courts below. In that view of the matter, there is no merit in the present revision application and therefore, the same deserves to be dismissed.

In above view of the matter, this revision application is ordered to be dismised. Rule is discharged. The interim relief granted earlier stands vacated. No order as to costs.

10. At this stage, learned Advocate for the petitioner states that some reasonable time may be

granted to the petitioner for vacating the rented premises. After hearing the learned Advocates for the parties, it is directed that the decree for possession of the rented premises shall not be executed for a period upto 31.12.2002 provided the petitioner submits a usual undertaking on oath before the trial court within two weeks. If the said undertaking is not filed within the stipulated period, then the aforesaid order suspending the execution of the decree will stand vacated without any order of the court.

7.8.2002 [D P Buch, J.]
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